



BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The only Court which rendered any opinion is the District Court which is reported in 46 F. Supp. 481, which opinion was adopted by the Circuit Court, and is found at pages 41-45 of the record.

Jurisdiction.

The jurisdiction is developed at page 5 of the petition.

**Statement of the Case, Questions Presented,
Statutes Involved, Etc.**

The statement of the case, the questions presented, and specifications of errors to be urged have been set forth in the petition.

ARGUMENT.

1(a) The petitioner's action for injunctive relief was not against the United States and the District Court had jurisdiction.

A court of equity has power to enjoin the acts of an administrative body of the executive branch of our Government which is proceeding beyond its statutory authority.

In *Waite v. Macy*, 246 U. S. 606, this Court in affirming the decree of the Circuit Court of Appeals reversing the District Court and granting an injunction, said at page 608:

"No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but is equally true that the board cannot enlarge the powers given to it by statute and cover usurpation by calling it a decision on purity, quality or fitness for consumption. *Morrill v. Jones*, 106 U. S. 466. *United States v. United Verde Copper Co.*, 196 U. S. 207, 215. *United States v. George*, 228 U. S. 14, 21. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. *First National Bank of Albuquerque v. Albright*, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make."

And further at page 610:

"The Secretary and the Board must keep within the statute (*Merritt v. Welsh*, 104 U. S. 694) which goes to their jurisdiction (see *Interstate Commerce Commission v. Northern Pacific Ry. Co.*, 216 U. S. 538, 544), and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in *Bacon v. Rutland R. R. Co.*, 232 U. S. 134; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620; *Sante Fe Pacific R. R. Co. v. Lane*, 244 U. S. 492. We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights." (Italics ours.)

This Court in *Merritt v. Welsh*, 104 U. S. 694, said at page 704:

"If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department, or the Courts, to take the part

of legislative guardians, and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, but which Congress itself, on being properly informed, has not, as yet, seen fit to make."

It is submitted that when this Court affirmed the decree of the Circuit Court in *Electric Bond and Share Company v. Securities and Exchange Commission*, 303 U. S. 419, 443, and therein sustained the dismissal of the cross-bill of the said company wherein it sought among other things injunctive relief against the Commission, that such dismissal was not because the Court lacked jurisdiction but because this Court declined the invitation "to enter into a speculative inquiry for the purpose of condemning statutory provisions, the effect of which in concrete situations, not yet developed, cannot be definitely perceived."

In *Interstate Commerce Commission v. United States ex rel Humbolt Steamship Company*, 224 U. S. 474, this Court, when affirming, said at page 484:

"The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the act creating it. It may act of its own motion in certain instances—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its non-action be reviewed The answer of the Commission is by 'a reversal by the tribunal of appeal.' And such a tribunal, it is intimated, is the United States commerce court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the commerce court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an application was not entitled to relief. This is so because, the action of the Commission refusing to entertain a petition on the ground that its subject matter was not within the scope of the powers conferred upon it would not be embraced within the hypothetical concessions thus made. A like view disposes of the cases relied upon in which it was decided that certain departmental orders were not susceptible of being reviewed by mandamus. We do not propose to review the cases, as we consider them to be plainly inapposite to the subject in hand."

This Court in the case of *In re National Labor Relations Board*, 304 U. S. 486, determined that the Judges of a Circuit Court of Appeals should be prohibited from making an order which this Court held they lacked jurisdiction to make under the National Labor Relations Act. The situations are apposite and it is inconceivable that the Courts lack jurisdiction to enjoin the Securities and Exchange Commission, a mere administrative body, from exceeding its statutory authority under the Public Utility Holding Company Act of 1935.

District Judge Mandelbaum in his opinion stated (R. 44):

"Plaintiff, in support of jurisdiction, contends that the claim of sovereign immunity will not defeat an equitable action, where the acts of governmental officers unlawfully invaded vested rights. Some of the

cases cited by him have dealt with such question. *Fox v. Ickes*, 300 U. S. 82; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Franklyn Turnpike v. Tugwell*, 85 F. (2d) 208.

I fail to discern any similarity to the cases cited by the plaintiff and the one at bar. In the first place, they were suits against individuals and not against an agency of the government itself. Secondly, Section 24 (a) provided a remedy to those who question the action of the Commission. This meets the constitutional requirements of due process of law. To sustain the plaintiff's argument would in effect result in a contravention of the intent of Congress in enacting Section 24 (a) of the Holding Company Act of 1935. Evidently, plaintiff is seeking a review of an order of the defendant through the medium of an injunction. This he cannot do. *Myers v. Bethlehem Corp.*, 303 U. S. 41."

It is respectfully submitted that the decisions hereinbefore referred to are contrary to and do not support the District Court's opinion, adopted by the Circuit Court.

The Securities and Exchange Commission in its said order dated February 20th, 1942, permitted the declaration of the Electric Bond and Share Company to become effective to the extent of \$2,000,000, and reserved jurisdiction as to the remaining \$3,000,000. The said order was therefore merely interlocutory and not reviewable under Section 24(a) of the said Public Utility Holding Company Act of 1935.

The petitioner's right to relief in the lower Courts was predicated on the equitable jurisdiction of the District Court and/or the jurisdiction provided for in Section 25 of the Public Utility Holding Company Act of 1935, hereinafter referred to.

It is submitted that the District Court had jurisdiction of the action.

1(b) Section 25 of the Public Utility Holding Company Act of 1935, authorizes the commencement of an equitable action against the Securities and Exchange Commission. The District Court had jurisdiction to review Rule U-42.

Under Section 25 of the Public Utility Holding Company Act of 1935, District Courts of the United States are given jurisdiction of equitable actions with respect to the provisions of said Act.

Section 20 of said Act authorizes the Securities and Exchange Commission to make, issue, amend and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of the Act.

The promulgation of Rule U-42 by the said Commission was in excess of its statutory authority and the said Commission violated the provisions of the said Act. The District Court had jurisdiction under Section 25 of said Act, to enjoin any violation of the provisions of the Act.

The reference in Section 25 to violations of the Act, must necessarily mean all violations by every one affected by the Act, including the Securities and Exchange Commission. That said Section 25 contemplated the commencement of actions against the said Commission is evident from the provision therein, "No costs shall be assessed for or *against* the Commission in any proceeding under this title brought by or *against* the Commission in any court." (Emphasis ours.)

In referring to said Section 25, District Judge Mandelbaum said:

"Plaintiff urges that Section 25 of the Holding Company Act of 1935 confers upon this court jurisdiction to entertain this suit. An examination of the language persuades me otherwise. This section deals with the jurisdiction of the district court over offenses committed by persons or suits against such persons

for violations of the Holding Company Act of 1935. Nothing in the language indicates that it includes the Securities and Exchange Commission as a possible violator of the Act, nor has any case been cited which in any way supports such theory."

It is respectfully submitted that the lower Court erred in its interpretation of said Section 25.

This Court's recent decision in *Columbia Broadcasting System, Inc. v. United States*, 316 U. S. 407, it is submitted, completely sustains our contentions that the District Court had jurisdiction of the petitioner's action under said Section 25. In said *Columbia Broadcasting* case, this Court said at page 423:

"Moreover, if the Commission's order is as we hold a reviewable order, appellant is free to seek review under § 402 (a). It is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed for the trial of like issues so far as they may be raised on review of an order denying a license. Such issues may likewise be involved in a proceeding, upon the Commission's own motion, for modification or cancellation of a license, which concededly is reviewable under § 402 (a). See *Scripps-Howard Radio, Inc., v. Federal Communications Commission*, *supra*. But review of the order by a licensee in such a proceeding affords no adequate remedy. If ever instituted, which is uncertain, it would come too late to save appellant from the injury wrought by the outlawry of its contracts."

And further at page 425:

"The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the

review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402 (a) of the Act, and that the bill of complaint states a cause of action in equity."

Section 402(a) of the Communications Act of 1934 is not only similar to said Section 25 of the Public Utility Holding Company Act of 1935, but it is our contention that the said Section 25 is broader in its scope than said Section 402(a).

The Communications Act of 1934 (§ 402[a]), provides that:

*"The provisions of the Act of October 22, 1913 (38 Stat. 219), relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for modification of an existing radio station license), and such suits are hereby authorized to be brought as provided in that Act. * * *"*

Subdivision (b) of Section 402 of said Communications Act of 1934 is similar to Section 24(a) of the Public Utility Holding Company Act of 1935.

The facts in the said Columbia Broadcasting case (*supra*) and this Court's determination therein, are so applicable to facts herein, that the conclusion is inevitable

that the District Court had jurisdiction of the petitioner's action, and the judgment of the Circuit Court herein is contrary to this Court's said decision.

1(c) The Securities and Exchange Commission had no power to adopt Rule U-42 and has no authority in any way, shape or manner to prevent the Electric Bond and Share Company from purchasing its preferred stock with its own cash by tenders or in the open market in accordance with the laws of the State of New York under which said corporation was organized and pursuant to the certificate of consolidation which organized said Electric Bond and Share Company, without first obtaining the permission and order of the said Securities and Exchange Commission to make said purchases of said preferred stock.

The Public Utility Holding Company Act of 1935 does not contain a single provision which can in any way be construed as preventing a holding company from purchasing its own preferred stock with its own cash in accordance with the laws under which it was organized and pursuant to its own certificate of incorporation.

The only section of the said Act which the Securities and Exchange Commission apparently believes authorizes it to interfere with said purchases and to promulgate Rule U-42 is Section 12(c). A brief consideration of said statutory provisions destroys completely the Commission's contentions.

Section 12(c) is referred to in 49 Stat. 823 as "dividend payments".

The Senate Report No. 621 of the Senate of the United States accompanying the said Public Utility Holding Company Act of 1935, at page 34, in referring to Section 12 of said Act, says:

"Complete regulation of intercompany transactions is provided to prevent the milking of operating com-

panies in the interests of the controlling holding-company groups. Section 13 below deals specifically with service, sales, and construction contracts within holding-company systems. Section 12 covers other intercompany transactions detrimental to operating companies. The range of practices which this section attempts to reach is broad because unless appropriate discretion is given to the Commission, new devices will spring up and may result in nullifying the provisions of title I."

And the said Senate Report No. 621 further states, at page 35, in referring to Section 12(c):

"Subsection (c) makes it unlawful for any company in a holding company system to declare or pay any dividend or to acquire or redeem any of its own securities in contravention of such rules, regulations or order as the Commission may prescribe to protect the financial integrity of such companies, to safeguard their working capital or to prevent the payment of dividends out of capital or unearned surplus. The exaction of excessive dividends from subsidiary operating companies may be even more harmful than the taking of upstream loans."

This Court in *Electric Bond and Share Company v. Securities and Exchange Commission*, 303 U. S. 419, when discussing the various sections of the said Public Utility Holding Company Act of 1935, at page 438, referred to Section 12 as relating to "intercompany transactions".

A purchase by a holding company of its preferred stock with its own cash by tenders or in the open market in accordance with the laws of the State under which it is organized and pursuant to its certificate of incorporation,

does not constitute an "intercompany transaction" or a "dividend payment".

The purchase by the Electric Bond and Share Company of its preferred stock of its own cash by tenders or in the open market in accordance with the laws of the State of New York under which said corporation was organized and pursuant to the certificate of consolidation under which the said company was organized (hereinbefore referred to), is not and does not constitute any "intercompany transaction" or "dividend payment" as provided for in Section 12(c) of the said Public Utility Holding Company Act of 1935.

The Securities and Exchange Commission had no statutory power to adopt the said Rule U-42 and the said Rule is not authorized by the provisions of the said Public Utility Holding Company Act of 1935. The promulgation and adoption of the said rule was in violation of the provisions of the said Act.

The Securities and Exchange Commission had and has no power whatsoever under the provisions of the said Public Utility Holding Company Act of 1935, or any other Act of Congress, to in any way prevent the said Electric Bond and Share Company from in any way purchasing its outstanding preferred stock with its own cash as permitted by the laws of the State of New York and the Certificate of Consolidation of the said Electric Bond and Share Company pursuant to which said corporation was organized.

In *Jones v. Securities and Exchange Commission*, 298 U. S. 1, at page 23, this Court said:

"The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rests—that this shall be a government of laws—, because to the precise extent that the mere

will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant and if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd v. United States*, 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in the mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be *obsta principia*'."

The foregoing, it is respectfully submitted, supports plaintiff's contentions that Rule U-42 is not authorized by the provisions of the Public Utility Holding Company Act of 1935 and constitutes an attempted usurpation of power by the Securities and Exchange Commission.

1(d) The laws of the State of New York permit a corporation to purchase its own preferred stock with its own cash from its earned surplus either by tenders or in the open market or in any manner whatsoever which is lawful.

On the 31st day of December, 1941, the said Electric Bond and Share Company had an earned surplus of \$63,116,391.94, as appears on the balance sheet of the said company as of December 31, 1941 (R. 8); and in its decla-

ration filed with the Securities and Exchange Commission on December 30, 1941 the said Electric Bond and Share Company stated it had on hand \$24,000,000 in cash and cash items which was not necessary for the business of the said company, and in said declaration, the said Electric Bond and Share Company stated its intention to use \$5,000,000 of its said cash in the purchase of its preferred stock on the New York Curb Exchange (R. 9).

The laws of the State of New York permit such purchases under such circumstances.

City Bank of Columbus v. Bruce, 17 N. Y. 507.

Vail v. Hamilton, 85 N. Y. 453, 457.

Cross v. Beguelin, 252 N. Y. 262, 265 (affirming 226 App. Div. 349, 350).

In re Fechheimer Fishel Co., 212 Fed. (2nd Cir.) 357, 361.

Joseph v. Raff, 82 App. Div. 47, 54; aff. 176 N. Y. 611.

Grasselli Chemical Co. v. Aetna Explosive Co., 258 Fed. 66.

Melniker v. American Title & Guarantee Co., 253 App. Div. 570.

1(e) The legal and property rights of the petitioner are being threatened and invaded by the acts of the Securities and Exchange Commission.

The petitioner as owner of the nine thousand (9,000) shares of the common stock of the said Electric Bond and Share Company has legal and property rights by reason of the said stock interests which are being threatened and invaded by the acts of the said Securities and Exchange Commission.

Ashwander v. Valley Authority, 297 U. S. 288, 318, 321, 322, 323.

Matter of American Fibre Chair Seat Corp., 265 N. Y. 416, 420.

Lord v. Equitable Assur. Society, 194 N. Y. 212, 228.

Personal Industrial Bankers v. Citizens Budget Co., 80 F. (2d) 327, 328 (C. C. A. 6th Cir., certiorari denied 298 U. S. 674).

Wagstaff v. Holly Sugar Corp., 253 App. Div. 616, 620 (aff. 279 N. Y. 625).

CONCLUSION.

It is respectfully submitted that this petition should be granted.

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